NO. 80-509

Supreme Court, U. S.
FILED
SEP 29 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1980

AMERICO MONGIELLO,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

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QUESTIONS PRESENTED

Was the petitioner denied due process of law as well as equal protection of the laws thereof as is mandated of each state by the Fourteenth Amendment to the United States Constitution?

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AMERICO MONGIELLO,

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-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

Americo Mongiello hereby petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of New York, Appellate Division, First Department, which affirmed a judgment of conviction of the Supreme Court of the State of New York, Appellate Division, First Department.

Leave to appeal to the Court of Appeals of the State of New York was denied on July 30, 1980.

OPINION BELOW

No opinion was rendered by either of the aforesaid courts. The order of affirmance on appeal, and the Certificate Denying Leave to appeal are unreported, but are set forth herein in the Appendix.

JURISDICTION

The Certificate of the Court of Appeals of the State of New York was dated and entered on July 30, 1980. Jurisdiction is conferred upon this Court by 28 U.S.C. 1257(3).

The petitioner has exhausted all state appellate remedies.

STATEMENT

The petitioner was charged in a five-count indictment with the crimes of perjury in the first degree, official misconduct and harassment.

The petitioner was represented at trial and on appeal by Aaron J. Jaffe, Esq.

The People of the State of New York have been represented by Hon. Robert M. Morgenthau, the District Attorney of New York County.

The petitioner proceeded to trial before the Honorable Fritz W. Alexander and a jury in the Supreme Court of the State of New York, County of New York.

The jury returned a verdict of guilty as charged.

The petitioner was thereafter sentenced to a term of imprisonment, the minimum of which was to be one and one half (1½) years, and the maximum four (4) years.

The petitioner, having surrendered his passport, remains at liberty.

STATEMENT OF FACTS

On February 4, 1978 in the hallway of a multiple dwelling at 209 Madison Avenue, in the County, City and State of New York, multiple arrests occurred. Sergeant John Hooper, Detective Ritter and the petitioner entered the premises seeking two individuals, one wearing a "blue puffy jacket" and the other wearing a "plaid garment" (S.M. 799-800).* The police entry was precipitated by an electronic communication from fellow police officers who were on an adjoining roof (S.M. 796).

The entry was effected with Detective Ritter in the lead, followed by Sergeant Hooper and the petitioner (S.M. 799). Detective Ritter proceeded to the rear of the hallway and Hooper upon entry saw one of the individuals in the hallway, to wit, i.e., Freddie Jones, pointing a revolver at him and the petitioner (S.M. 806).

Hooper thereupon struck Freddie Jones and this blow caused the weapon to be discharged, and the petitioner was struck in the neck and throat (S.M. 807-808).

A melee then ensued and in order to restore order and effect the arrest of the participants, force was used.

Jones denied that he possessed and/or fired the revolver. There was a conflict of testimony, with the People contending that the revolver was owned by Lester Bryant, who had disposed of it in an effort to conceal possession.

He further testified that the weapon bounced off the wall, fell to the ground and that the petitioner retrieved it, whereupon it went off.

The petitioner testified that he saw Freddie Jones, dressed in his blue puffy jacket, discharge the weapon.

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* S.M. refers to the Stenographic Minutes of the trial.

CONSTITUTIONAL AMENDMENT INVOLVED

Fourteenth Amendment

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

REASONS FOR GRANTING THE WRIT

The petitioner contends that at trial he was deprived of due process of law as well as equal protection of the laws thereof as is mandated of each State by the Fourteenth Amendment to the United States constitution.

POINT ONE

THE PETITIONER WAS DEPRIVED OF DUE PROCESS OF LAW

At trial the petitioner placed in issue his reputation for honesty, integrity and a lack of aggressiveness. On cross-examination the prosecution inquired of Sergeant John Hooper, a character witness, whether he had heard that the petitioner while on duty had wrongfully and without justification "punched a man in the face" and then had handcuffed him.

Objection to the question was promptly and vigorously made. The Court was then informed that the petitioner had been exonerated by an official departmental hearing,

which the prosecutor conceded to be the truth, and it was charged that the question had been put in an absence of good faith.

It is submitted that this deliberate inflammatory and prejudicial query was prompted not only by an absence of good faith, but a desire to obtain a conviction irrespective of the basic requirement of fairness.

Although a character witness may be questioned about rumors or reports of particular acts, inconsistent with the reputation attributed to the petitioner, the right is not absolute.

A question may not be put to a witness so as to prove the truth of a baseless and irresponsible rumor. Moreover no question may be propounded as to reputation unless it be done in good faith. *Michelson v. United States,* 335 U.S. 469 (1948). It is submitted that the learning is promulgated by this Court in *Michelson v. United States, supra,* and which was so ably marshalled and evaluated in the opinions of both Jackson, J., for the Court, and Rutledge, J., dissenting, were egregiously violated at trial. In short, the prosecutor sought to obtain a conviction by throwing open the defendant's whole life, both in general reputation and in specific incident, knowing that there was no factual basis for the question.

When a prosecutor asks a defense character witness whether he has heard or knows of any other parallel offenses as to which the accused stood charged, the possibility of destructive prejudice becomes ominous. The mere asking by a quasi-judicial officer of such a question, however answered, may well suggest to the jury that the imputation is true, namely that the petitioner, a law enforcement officer, did wrongfully assault a civilian. There is no question that putting such a query to a character witness, absent good faith, may and should be grounds for reversal. *McCormack on Evidence,* 2nd Ed., Section 191, p. 458. Indeed as this Court noted in *Michelson v. United*

States, supra, merely by asking a groundless question the interrogator is able to "waft an unwarranted innuendo into the jury box."

The only way in which this pernicious line of cross-examination can be thwarted is if the Court were to hold a preliminary hearing as to the allegation in the absence of the jury. It must then be convinced that the question is put in good faith, pertains to an actual occurrence and carefully instructs the jury as to the limited purpose of the evidence. It is submitted that there was a wanton absence of good faith in the case at bar when the prosecutor full well knew that the petitioner had been exonerated of a baseless charge.

It is submitted that the purity of the fact finding responsibility of the jury can be maintained only by the Court making a thorough, proper and valid preliminary determination, i.e., *Jackson v. Denno,* 378 U.S. 368 (1964), as to the proffered query and purported good faith basis therein. It is submitted that such was not done in the case at bar.

The Eighth Circuit Court in *Gross v. United States,* 394 F.2d 216 (1968) at 222, in discussing queries put to character witnesses, held that:

> ["it is permissible to ask these witnesses whether they have 'heard' of rumors which could injuriously affect their evaluation, provided that the prosecution acts in the good faith belief that the incidents to which the questions allude actually occurred, and the jury is instructed as to the limited weight which such 'evidence' may be given."].

The United States Court of Appeals for the Second Circuit in *United States v. Beno,* 324 F.2d 582 (1963) at 588, held that:

"[where a defendant has offered *proper* character testimony through witnesses who testify to his good reputation in the community, it is permissible to ask these witnesses whether they have "heard" of rumors which could injuriously affect their evaluation, provided that the prosecution acts in the good faith belief that the incidents to which the questions allude actually occurred, and the jury is instructed as to the limited weight which such "evidence" may be given. Michelson v. United States, 335 U.S. 469, 69 S.Ct. 213, 93 L. Ed. 168 (1948); United States v. Giddins, 273 F.2d 843 (2d Cir.), cert. denied, 362 U.S. 971, 80 S. Ct. 955, 4 L.Ed.2d 900 (1960); United States v. Conforti, 200 F.2d 365 (7th Cir.), cert. denied, 345 U.S. 925, 73 S.Ct. 782, 97 L.Ed. 1356 (1953).

In *United States v. West,* 460 F.R.2d 374 (1972) at 376, the Fifth Circuit held that:

"[We endorse, as the better practice, an *in camera* showing prior to cross-examination, that the prosecution has, in good faith, some factual basis for the rumors to be inquired about. The court is thus in a position to exercise its judicial discretion before the matter is presented to the jury. Gross v. United States, 8 Cir. 1968, 394 F.2d 216; United States v. Beno, 2 Cir. 1963, 324 F.2d 582, cert. denied, 379 U.S. 880, 85 S.Ct. 147, 13 L.Ed.2d 86; United States v. Giddins, 2 Cir. 1960, 273 F.2d 843 cert. denied, 362 U.S. 971, 80 S. Ct. 955, 4 L.Ed.2d 900; Malatkofski v. United States, 1 Cir. 1960, 179 F.2d 905.]"

In *United States v. Jordan,* 454 F.2d 323 (1971) at 325, the Seventh Circuit held that it was reversible error for the Court, over objection, to permit cross-examination of a defendant's reputation witnesses concerning an indictment which had been returned against the defendant subsequent to the transaction there in question, and which had subsequently been dismissed. The Court further cited the holding in *Gross v. United States, supra,* at 223, that:

["It is our conclusion that when the prosecution attempts to attack the credibility of the defendant's character witnesses *** that there should be a prior showing, out of the hearing of the jury, establishing to the trial judge's satisfaction the truth of the basis for such inquiry and, further, cautionary and guiding instructions should be given, preferably both at the time of the inquiry and in the closing charge to the jury."]

It is submitted that here the prosecution wrongfully, absent any good faith and with manifest prejudice, allowed a jury, prior to a hearing and or the establishment of good faith, to be apprised of a groundless allegation that the petitioner had "punched a man in the face" and then had handcuffed him.

It is patent that when a white police officer, accused of being brutal to blacks and perjurious as to his actions thereto, stands trial that the promulgation of a groundless, inflammatory question as to the pivotal issue of prior brutality is unfair and prejudicial. Such prosecutorial misconduct constituted a clear deprivation of due process.

POINT TWO

THE PETITIONER WAS DENIED EQUAL PROTECTION OF THE LAWS

The petitioner when sentenced was excoriated. The sentencing minutes in their entirety have been set forth in the Appendix. The Court in imposing sentence clearly set forth that it was not concerned with the defendant as an individual, but rather as a representative of a group which it considered to be responsible for egregious lawlessness in the administration of criminal justice. Its comments that:

"It should be understood that I do not intend, by these remarks to refer to any other than this defendant, other

police officers who are not here involved; however, as would other citizens of our community in positions of trust in confidence would do well to mark these words, our police are our guardians and they should guard us well in all forms of lawlessness, including their own.

* * *

"And to demonstrate to others who are guardians that higher standards of conduct and greater fealty to their oath is demanded."

clearly manifest that it was not imposing sentence upon the petitioner as an individual, but as a member of a group whose very conduct it deemed monolithic.

The Court in stating that the petitioner's punishment was to serve as an example to others and that higher standards of conduct and greater fealty to their oath is demanded paid no heed to the fundamental constitutional requirements of individualized as contrasted to group punishment.

CONCLUSION

A Writ of Certiorari should be granted so as to review and decide the claimed deprivation of the petitioner's rights under the Fourteenth Amendment.

Respectfully submitted,

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APPENDICES

INDICTMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, CITY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

AMERICO MONGIELLO,

Defendant.

THE GRAND JURY OF THE COUNTY OF NEW YORK, by this indictment accuse the defendant of the crime of PERJURY IN THE FIRST DEGREE, in violation of Section 210.15 of the Penal Law, committed on June 20, 1978, in the County of New York, as follows:

The Grand Jury having been duly and properly empanelled, was conducting an investigation which sought to determine whether the crimes of ATTEMPTED MURDER, CRIMINAL POSSESSION OF A WEAPON, ASSAULT, BRIBING A WITNESS, TAMPERING WITH A WITNESS, OFFICIAL MISCONDUCT AND PREJURY had been committed in New York County.

Specifically the Grand Jury sought to determine whether Freddie Jones a/k/a Stewart Lemon on February 4, 1978 inside the ground floor hallway of 2092 Madison Avenue City and County of New York, possessed and fired a .357 Magnum revolver which resulted in a bullet fragment lodging in the neck of Police Officer Americo Mongiello. The Grand Jury also sought to determine whether force was necessary to effect the arrest of Freddie Jones a/k/a Stewart Lemon and 11 others inside 2092

Madison Avenue on February 4, 1978, or whether police officers intentionally used excessive force in effecting those arrests.

Additionally, the Grand Jury sought to ascertain whether any police officers had unlawfully threatened Douglas Williams with prosecution unless he testified falsely that he observed Freddie Jones in possession of a gun inside the first floor hallway of 2092 Madison Avenue on February 4, 1978, or whether any police officer agreed to unlawfully influence a pending case against Douglas Williams in return for Williams aforementioned false testimony.

The Grand Jury received evidence that on the evening of February 4, 1978 upon the entry of Police Officers into the first floor hallway of 2092 Madison Avenue, City and County of New York, a gun was discharged, and a bullet fragment therefrom struck Police Officer Americo Mongiello in the neck.

In addition, the Grand Jury heard evidence that only one shot had been fired inside the aforementioned hallway and that it had been fired by a police officer. The Grand Jury further heard testimony that police officers inside the hallway questioned numerous persons present as to who had fired the shot and then assaulted those individuals when they failed to identify the shooter.

The Grand Jury also received evidence that Freddie Jones a/k/a Stewart Lemon was arrested by Sergeant John Hooper inside 2092 Madison Avenue, City and County of New York on February 4, 1978, and charged with attempted Murder and Criminal Possession of a Weapon. The Grand Jury also heard evidence that Sergeant John Hooper had sworn in a Criminal Court complaint affidavit that he observed Freddie Jones a/k/a Steward Lemon with a .357 Magnum revolver in his hand immediately before that gun discharged.

On June 20, 1978 the defendant appeared before the

Grand Jury, and after having been duly sworn before the Grand Jury, the Grand Jury having the authority to administer the oath, the defendant swore and stated under oath that he would testify truthfully in connection with the investigation, and the defendant did give testimony under oath before the Grand Jury, a body authorized by law to conduct such an investigation. The defendant reappeared before the Grand Jury and gave testimony under oath on October 13, 1978.

The defendant testified that he was and had been for approximately ten and one half years a member of the New York City Police Department and that he had been a member of the Special Narcotics Enforcement Unit for approximately three years.

The defendant further testified that on February 4, 1978 he was a member of a Special Narcotics Enforcement Unit Team under the supervision of Sergeant John Hooper and consisting of himself, Detective Robert Ritter, Police Officer Leonard Leggio, Police Officer Robert Glickstein and Police Officer Gerard Devlin. The defendant additionally testified that on February 4, 1978, at approximately 7:30 p.m. he and other members of his team entered the first floor hallway of 2092 Madison Avenue, City and County of New York.

Accordingly, the Grand Jury sought to determine whether the defendant knew who fired the shot inside the hallway at that time.

In order to determine whether the crimes of ATTEMPTED MURDER, CRIMINAL POSSESSION OF A WEAPON, ASSAULT, BRIBING A WITNESS, TAMPERING WITH A WITNESS, OFFICIAL MISCONDUCT, AND PERJURY had been committed in New York County, and in particular in order to ascertain whether Freddie Jones a/k/a Stewart Lemon had fired the shot inside the hallway of 2092 Madison Avenue on February 4, 1978, it became material and necessary to ask

the defendant what happened when he entered the hallway of 2092 Madison Avenue on that date.

Whereupon on June 20, 1978, the defendant in New York County, knowingly swore falsely that on the evening of February 4, 1978, upon entering 2092 Madison Avenue, County and City of New York he observed Stewart Lemon at the front of the ground floor hallway of said premises with a gun in his hand.

Whereas, in truth and in fact, as the defendant well knew, said testimony was false and the truth was that the defendant did not see Stewart Lemon with a gun in his hand at the front of the ground floor hallway upon entering 2092 Madison Avenue on February 4, 1978, and that Stewart Lemon did not in fact possess a gun at that time and place.

The said false testimony was to a material matter in that the purpose of the investigation was to determine whether the crimes of ATTEMPTED MURDER, CRIMINAL POSSESSION OF A WEAPON, ASSAULT, BRIBING A WITNESS, TAMPERING WITH A WITNESS, AND PERJURY had been committed in New York County, and particularly to ascertain whether Freddie Jones a/k/a Stewart Lemon or someone else had fired the shot inside the hallway of 2092 Madison Avenue on February 4, 1978.

SECOND COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse the defendant of the crime of PERJURY IN THE FIRST DEGREE, in violation of Section 210.15 of the Penal Law, committed on June 20, 1978, in the County of New York, as follows:

THE GRAND JURY, having been duly and properly empanelled, was conducting an investigation which sought to determine whether the crimes of ATTEMPTED

MURDER, CRIMINAL POSSESSION OF A WEAPON, ASSAULT, BRIBING A WITNESS, TAMPERING WITH A WITNESS, OFFICIAL MISCONDUCT AND PERJURY had been committed in New York County.

The defendant testified that he was and had been for approximately ten and one half years a member of the New York City Police Department and that he had been a member of the Special Narcotics Enforcement Unit for approximately three years.

The defendant further testified that on February 4, 1978 he was a member of a Special Narcotics Enforcement Unit team under the supervision of Sergeant John Hooper and consisting of himself, Detective Robert Ritter, Police Officer Leonard Leggio, Police Officer Robert Glickstein and Police Officer Gerard Devlin. The defendant additionally testified that on February 4, 1978, at approximately 7:30 p.m. he and other members of his team entered the first floor hallway of 2092 Madison Avenue, City and County of New York.

Accordingly, the Grand Jury sought to determine whether the defendant knew who fired the shot inside the hallway at that time.

In order to determine whether the crimes of ATTEMPTED MURDER, CRIMINAL POSSESSION OF A WEAPON, ASSAULT, BRIBING A WITNESS, TAMPERING WITH A WITNESS, OFFICIAL MISCONDUCT, AND PERJURY had been committed in New York County, and in particular in order to ascertain whether Freddie Jones a/k/a Stewart Lemon had fired the shot inside the hallway of 2092 Madison Avenue on February 4, 1978, it became material and necessary to ask the defendant what happened when he entered the hallway of 2092 Madison Avenue on that date.

Specifically the Grand Jury sought to determine whether Freddie Jones a/k/a Stewart Lemon on February 4, 1978 inside the ground floor hallway of 2092 Madison

Avenue, City and County of New York, possessed and fired a .357 Magnum revolver which resulted in a bullet fragment lodging in the neck of Police Officer Americo Mongiello. The Grand Jury also sought to determine whether force was necessary to effect the arrest of Freddie Jones a/k/a Stewart Lemon, and 11 others inside 2092 Madison Avenue on February 4, 1978, or whether police officers intentionally used excessive force in effecting those arrests.

Additionally, the Grand Jury sought to ascertain whether any police officers had unlawfully threatened Douglas Williams with prosecution unless he testified falsely that he observed Freddie Jones in possession of a gun inside the first floor hallway of 2092 Madison Avenue on February 4, 1978, or whether any police officer agreed to unlawfully influence a pending case against Douglas Williams in return for Williams aforementioned false testimony.

The Grand Jury received evidence that on the evening of February 4, 1978 upon the entry of Police Officer into the first floor hallway of 2092 Madison Avenue, City and County of New York, a gun was discharged, and a bullet fragment therefrom struck Police Officer Americo Mongiello in the neck.

In addition, the Grand Jury heard evidence that only one shot had been fired inside the aforementioned hallway and that it had been fired by a police officer. The Grand Jury further heard testimony that police officers inside the hallway questioned numerous person present as to who had fired the shot and then assaulted those individuals when they failed to identify the shooter.

The Grand Jury also received evidence that Freddie Jones a/k/a Stewart Lemon, was arrested by Sergeant John Hooper inside 2092 Madison Avenue, City and County of New York on February 4, 1978, and charged with Attempted Murder and Criminal Possession of a

Weapon. The Grand Jury also heard evidence that Sergeant Hooper had sworn in a Criminal Court complaint affidavit that he observed Freddie Jones a/k/a Stewart Lemon with a .357 Magnum revolver in his hand immediately before that gun discharged.

On June 20, 1978, the defendant appeared before the Grand Jury, and after having been duly sworn before the Grand Jury, the Grand Jury having the authority to administer the oath, the defendant swore and stated under oath that he would testify truthfully in connection with the investigation, and the defendant did give testimony under oath before the Grand Jury, a body authorized by law to conduct such an investigation. The defendant reappeared before the Grand Jury and gave additional testimony under oath on October 13, 1978.

Whereupon, on June 20, 1978, the defendant, in New York County swore falsely that on the evening of February 4, 1978, upon entering 2092 Madison Avenue in the County and City of New York, he observed a gun discharge while in the hand of Stewart Lemon at the front to the ground floor hallway of said premises.

Whereas in truth and in fact, as the defendant well knew, said testimony was false, and the truth was that the defendant upon entering 2092 Madison Avenue did not see a gun discharge while in the hand of Stewart Lemon at the front of the ground floor hallway of 2092 Madison Avenue and that a gun did not in fact discharge while in the hand of Stewart Lemon at that time and place.

The said testimony was to a material matter in that the purpose of the investigation was to determine whether the crimes of ATTEMPTED MURDER, CRIMINAL POSSESSION OF A WEAPON, ASSAULT, BRIBING A WITNESS, TAMPERING WITH A WITNESS, AND PERJURY had been committed in New York County, and particular to ascertain whether Freddie Jones a/k/a Stewart Lemon or someone else had fired the shot inside the hallway of 2092 Madison Avenue on February 4, 1978.

THIRD COUNT

AND THE GRAND JURY, by this indictment, further accuse the defendant of the crime of OFFICIAL MISCONDUCT in violation of Section 195.00 of the Penal Law, committed as follows:

Said defendant, in the county of New York, on or about June 20, 1978, being a public servant, to wit, a police officer in the Police Department of the City of New York, with intent to injure Freddie Jones a/k/a Stewart Lemon, to wit, to have an indictment returned against Freddie Jones, committed an act relating to his office but constituting an unauthorized exercise of his official functions knowing that such act was unauthorized in that the defendant, appeared before the Special Narcotics Courts Grand Jury investigating said incident and there did swear falsely that he observed Freddie Jones possess and fire a gun in the ground floor hallway of 2092 Madison Avenue, New York County, New York on the evening of February 4, 1978.

FOURTH COUNT

AND THE GRAND JURY AFORESAID, by this indictment, accuse said defendant of HARRASSMENT, in violation of Section 240.25 of the Penal Law, committed as follows:

The defendant, in the County of New York, on or about February 4, 1978, with intent to harrass Lester Bryant, struck Lester Bryant in the head with his gun,

FIFTH COUNT

AND THE GRAND JURY AFORESAID, by this indictment further accuse the defendant of the crime of OF-

FICIAL MISCONDUCT in violation of Section 195.00 of the Penal Law, committed as follows:

Said defendant, in the County of New York, on or about February 4, 1978, being a public servant, to wit, a police officer in the Police Department of the City of New York with intent to injure another to wit, Lester Bryant, committed an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act was unauthorized in that the defendant struck Lester Bryant on the head with his gun in the course of and in furtherance of placing Bryant into police custody knowing that such force was not necessary to effect the arrest of Bryant.

CERTIFICATE DENYING LEAVE

STATE OF NEW YORK
COURT OF APPEALS

Before the Hon. Bernard S. Meyer,
Associate Judge

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

AMERICO MONGIELLO,

Defendant-Appellant.

I, BERNARD S. MEYER, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that upon application timely made by the above-named appellant for a Certificate pursuant to C.P.L. 460.20, and upon the record and proceedings herein,* there is no question of law which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied (*See, People v. Liccione,* 50 N.Y.2d____(Decided June 3, 1980)).

Dated: New York, New York
July 30, 1980

s/
Bernard S. Meyer
Associate Judge

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* Description of order: Order of the Appellate Division, First Department, entered June 24, 1980, affirming the Judgment of the Supreme Court, New York County, rendered September 19, 1979, convicting defendant of perjury in the first degree, official misconduct and harassment.

ORDER OF AFFIRMANCE
ON APPEAL FROM JUDGMENT

At a term of the Appellate Division of the Supreme Court, held for the First Judicial Department in the County of New York on June 24, 1980.

PRESENT:
HON. THEODORE R. KUPFERMAN, Justice Presiding
HON. HAROLD BIRNS
HON. ARNOLD L. FEIN
HON. ARTHUR MARKEWICH
HON. MAX BLOOM, Justices

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

AMERICO MONGIELLO,

Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from the Judgment of the Supreme Court, New York County (Alexander, J.), rendered on September 19, 1979, convicting defendant of perjury in the first degree, official misconduct and harassment, and said appeal having been argued by Mr. Aaron J. Jaffe, of counsel for the defendant, and by Mr. Marc Frazier Scholl, of counsel for the respondent; and due deliberation having been had thereon, it is unanimously ordered

and adjudged that the judgment so appealed from be and the same here is, in all things, affirmed, the case remitted to the Supreme Court, New York County, for further proceedings pursuant to C.P.L. 460.50(5).

ENTER
JOSEPH J. LUCCHI, Clerk

Counsel for the appellant is referred to Section 606.5, Rules of the Appellate Division, First Department.

CROSS-EXAMINATION OF CHARACTER WITNESS

* * *

Q. Now, I notice when Mr. Jaffe asked you about Mr. Mongiello's reputation, for honesty, you answered, excellent. When he asked you about his reputation for integrity, you answered, excellent. When he asked you about his reputation for non-aggressiveness, you said, good.

Is there some reason, something in your mind that caused you to drop his rating when it at that time came to non-agressiveness from excellent to good?

A. No, sir.

Q. If that question were put to you again, suppose, assume I would be Mr. Jaffe, and do you know his reputation for non-aggressiveness?

MR. JAFFE: He is not Jaffe, and it has been asked and answered.

THE COURT: Overruled.

Q. Would you change your answer now?

A. What question are you asking me?

Q. Do you recall your telling Mr. Jaffe, or telling this jury, earlier, Mr. Mongiello's reputation for non-aggressiveness was, quote, unquote, good?

A. I recall that, yes.

Q. Now, do you wish to change your answer with respect to his reputation for non-aggressiveness?

MR. JAFFE: I object.

THE COURT: Overruled.

THE WITNESS: I don't wish to change any of my answers.

Q. Have you reflected upon the fact that you rated him excellent for honesty, excellent for integrity, and good for non-aggressiveness?

MR. JAFFE: I object.

THE COURT: I'll allow it.

THE WITNESS: I think I answered that question many times. I have no wish to change my answers.

Q. Have you heard, have you heard, did you hear in the year 1975, April, Mr. Mongiello while on duty wrongfully and without justification punched a man in the face and pushed him?

MR. JAFFE: I object.

THE COURT: Overruled.

Q. HAVE you heard that?

A. No.

Q. Never heard that?

A. I don't recall it.

MR. JAFFE: May we approach the bench?

THE COURT: At the side bar.

(WHEREUPON, THERE WAS A DISCUSSION AT THE SIDE BAR ON THE RECORD BUT OUT OF THE HEARING OF THE JURY, BETWEEN BOTH ATTORNEYS AND THE COURT.)

MR. JAFFE: He is driving on towards a disciplinary hearing I presume about something that occurred on the street. It's my understanding that the charges were thrown out.

MR. BROOMER: That is true.

MR. JAFFE: You can't use it.

MR. BROOMER: United States against Michaelson (phonetic spelling), that talks about arrest.

MR. JAFFE: That's right, arrests.

MR. BROOMER: The general question that is put to a character witness, and a character witness allegedly testifies to the individual's reputation in the community. That character witness can be asked, did you hear that the man has been arrested that would be known to people in the community. This is a special character witness. He has testified to his reputation in the police community. This man makes an effort to find out his character and reputation in the police community. I submit in view of the fact

that he is a different kind of a character witness, he has to be put a different kind of question, have you heard that he was arrested, have you heard the charges of aggression were preferred against this man.

MR. JAFFE: He is not a special kind of a character witness, he is a character witness.

THE COURT: The nature of the character witness testimony about his given testimony was restricted to a particular community. The police community.

MR. JAFFE: I said the police community, and the Police Department.

MR. BROOMER: He backed off of that.

MR. JAFFE: And you can't use it, you know it.

MR. BROOMER: I can use it, and I do know it.

THE COURT: The objection is overruled. You do have a good faith basis, Mr. Broomer?

MR. BROOMER: Yes, your Honor.

THE COURT: Let's proceed.

(WHEREUPON, THE SIDE BAR CONFERENCE ON THE RECORD BUT OUT OF THE HEARING OF THE JURY BETWEEN BOTH SIDES AND THE COURT CONCLUDED.)

MR. JAFFE: I will move now based on the discussions at bench for the withdrawal of the jury.

MR. BROOMER: I object to him doing this in front of the jury.

MR. JAFFE: Good for you.

THE COURT: The motion is denied, continue.

CONTINUED CROSS EXAMINATION

BY MR. BROOMER:

Q. At or about that time, did you hear about that?

A. I don't remember.

Q. You don't remember?

A. I do not remember.

Q. Did you hear also at or about that time Mr. Mongiello was charged with wrongfully, and without

justification handcuffing a man?

MR. JAFFE: I object.

THE COURT: Overruled.

Q. Does that refresh your recollection?

A. No, it does not.

Q. Were you working with Mr. Mongiello on or about April 28th, 1975?

A. Without having a memo book, I would have to assume so, yes.

Q. You never heard about that?

A. I have no recollection of what you are talking about.

Q. This information comes to you as a complete surprise?

A. I have no recollection of it.

Q. Well, isn't it a fact that Mr. Hooper, that while I just indicated to you was in part responsible for your answers to Mr. Jaffe that the defendant's reputation for non-aggressiveness was only good as compared with excellent, as compared with his reputation for honesty and integrity which you characterized as excellent?

MR. JAFFE: I object.

THE COURT: Sustained.

Q. What was in your mind when you downgraded his reputation from excellent to good with respect to non-aggressiveness?

MR. BROOMER: I object.

THE COURT: Rephrase the question.

MR. JAFFE: Would your Honor admonish the District Attorney from using loaded words?

MR. BROOMER: Mr. HOOPER, in your high hierarchy of values—

MR. JAFFE: I object, he is being sarcastic with the witness.

THE COURT: Overruled.

Q. In your hierarchy of values, Mr. Hooper, which comes above the other, excellent or good?

MR. JAFFE: I think the court can take judicial notice.

THE WITNESS: When I said excellent, and good, that was just my choice of words at the time. I never meant to give the impression that he was more or less in one category or the other.

Q. Would you mind answering my question?

MR. JAFFE: The question has been answered, your Honor.

THE COURT: Is that an objection, if it is, it is overruled.

Q. Did you hear the question?

A. I can't hear your question now.

Q. Did you hear the question? Did you hear the question?

A. Would you repeat it, please?

Q. So you didn't hear the question?

A. I would like to make sure I got it exactly.

Q. In your scale of values, is excellent, does excellent come above good, or is it the other way around, or do they mean the same thing to you?

A. At the time I answered the questions, I used them exchangeably. I never meant one to be above the other.]

* * *

COLLOQUY

* * *

THE CLERK: THE CASE continued between the People of the state of New York agaisnt Amerigo Mongiello, the defendant, his attorney and the Assistant District Attorney is present. The jurors are not present, your Honor.

MR. JAFFE: I checked the aspects of this case with this court without first inquiring as to the good faith basis of the questions with respect to the so-called charges against Mongiello for striking a civilian, and handcuffing a civilian. The court apparently relied upon United States against Michaelson which has nothing to do with the situation. The court procluded me from looking at the exhibit that was used. I might have been able to be of some assistance to the court when I asked the court denied the application, but the facts are this.

There were two cases, both cases were joint cases involving a Sargeant Joseph Coffey (phonetic spelling) and Patrolman Mongiello, and Sgt. Coffey was charged with striking a civilian on the 20th day of November, 1974, and of handcuffing wrongfully without justification one Daniel Lewis. Lewis was the victim of both offenses. Mongiello was simply charged with striking Mr. Lewis and handcuffing Mr. Lewis. There was a formal trial in this incident, and the Department was represented by Lt. John Rogers, and the respondent was represented by Lt. John Oliver. Both of the Police Department. Before the civilian complaint review board, on November 20th, it was charged that at 112th St. and Fifth Avenue in New York City, the respondent alleges that both of them punched one Daniel Lewis in the face, and thereafter handcuffed him. A stipulation was entered into by the respective counsel that the C.C.R.B. Statement of the John Raymond in Angel Lopez who were partners in a grocery store be

received in evidence. Both the men claimed he was struck and handcuffed, but neither could identify the officers involved. Mr. Mohammed stated that Mr. Lewis exaggerated about the whole incident, and that the police in the neighborhood think that Mr. Lewis is a police officer. Both claim there was a fight in the store, and they called the police to break it up. Then Daniel Lewis a community officer testified that on November 20th, 1974, he went to a grocery store located at 112th St. and Fifth Avenue because he had received a phone call from the owner a Mr. Mohammed that there were drug addicts hanging around the store. When he arrived he was approached by two police officers and asked for identification. After he had advised the officers, a Sargeant and a police officer, that he was a community service officer.

MR. BROOMER: Your Honor, I just want to say to save the court's time. If Mr. Jaffe wants to offer that as an exhibit, I have no objection.

THE COURT: Let him finish.

MR. JAFFE: After he had advised the officers, a Sargeant and a police officer, that was a community service officer, and had shown the officer his wallet, he claims he was grabbed from behind and was hit across the face by the police officer. Lewis claimed that the officer handcuffed him, and that when the owner of the store Mr. Mohamed came in, Lewis was set free of the handcuffs. Lewis claims that a Sargeant from the 28 precinct was there and took the handcuffs off of him. On cross examination, Mr. Lewis claims that when he entered the store, there was nothing going on but he admitted that the Sargeant and the police officer were present. Sgt. Burn (phonetic spelling) from the 28 precinct testified that he responded to a single 10 13. I presume that is aiding a police officer, that at the store and observed about ten people inside the store together with the respondent who were assigned to the adjourning 25 precinct. When he

entered Sgt. Bird (phonetic spelling) stated that he heard a lot of shouting but that the Sargeant had everything under control. Bird testified that he observed a man who was in handcuffs but was unable to identify him. Sgt. Bird admitted that he did not see the actual cuffing, and that he did not know who did the cuffing. The testimony of Sgt. Bird completed the Department's case. Sgt. Joseph Coffey one of the respondents, testified that he and police officer Mongiello were stopped for a traffic light on the corner of 115th St. and Park Avenue when Mr. Mohammed approached him and yelled they were wrecking my store. Even though the store was located across the street from the boundries of the 25 precinct, inside the 28, the respondent responded. When they arrived at the store, Sgt. Coffey testified that approximately ten to fifteen minutes,—ten to fifteen people were fighting inside. Sgt. Coffey stated that he went inside, and separated the people who were fighting by pushing them aside. He denied that he actually struck anyone, but claims he merely broke up the fight. When Coffey asked Mr. Mohammed if he wanted to make a complaint, Mohammed replied he just wanted the people out of his store. Coffey testified that he does not remember seeing Mr. Lewis at the store. Coffey denied that he or police Officer Mongiello had handcuffed anyone at the store. Sgt. Coffey and Police Officer Mongiello resumed patrol after the fight was over, and after the unit from the 28 precinct had arrived.

Stipulations were entered into that the police officer Mongiello was called to testify, he would testify similar to Sgt. Coffey. From the testimony, and this is in both oral and stipulated there is no doubt that on November 20th, 1974, the respondent at the beheast (phonetic spelling) of Mr. Mohammed responded to his grocery store and encountered a group of fighting therein. Mr. Lewis the department's main witness testified that when he entered the store, nothing was going on in the store. Sgt. Coffey

candidly admitted that he used some force to separate the people fighting, but denied ever having struck anyone. He further denied that he or Police Officer Mongiello had handcuffed Mr. Lewis.

The seriousness of this case lies not with the respondent, but rather with the actions of the Department's main witness Mr. Lewis, a community service officer has apparently left the impression with many citizens in the area around 112th St. and Fifth Avenue that he is a police officer. Lewis described that the owner had called him concerning drug addicts hanging around the store. When asked what he would do concerning this problem, Lewis stated he had contacts with the local precinct. Based upon all the foregoing, it's my opinion that the Department has failed to sustain his burden of proof, and my recommendation that the respondent be found not guilty on the subject charges which is precisely what occurred with regard to Daniel Lewis, the community service officer, he should be clearly warned against giving the impression to anyone that he is a police officer or that he has contacts with the local precinct. His functions relate more towards services to the community than law enforcement, and it is signed by the hearing officer, and a copy was sent to the Police Commissioner, and ultimately it was approved.

Now, what was present here and again, the court permitted that spontaneous presentation without requesting one whether the material was valid or whether it was presented in good faith, whether it was in fact true. However, what was presented was a statement did you know or words to similar import that Mongiello punched a man, and then the next statement that he handcuffed a man. Clearly, a type of statement that is akin to the harrassment charge in this indictment, and it was calculated deliberately to create the impression that this man was indeed an aggressive person, and capable of beating people willy nilly.

Now, it was cited for your Honor United States against Michaelson, a case which your Honor didn't read, and the Michaelson case does not stand for the proposition that bad faith actions or even good faith actions of a character like this are admissable into evidence to oppose or contradict character evidence or reputation evidence introduced by the defense.

Your Honor also refused to permit me to look at something that the district attorney was using, and looking at some of the reported cases, and I am citing McCormick on evidence. The trial judge it's believed should be required before permitting a prosecuting counsel to cross examine the character witness on rumors of misconduct of the accused or upon arrests charges or convictions to request the prosecutor to give his professional statements to the Judge in the absence of the jury that he has a reasonable ground to believe and does believe that the crimes or misconduct which are imputed by the rumors which are the subject of the arrest, or charges were actually committed by the accused, and that the Judgments of the convictions were actually pronounced, and he cites Michaelson against the United States. He cites a cold case, and a number of other cases. He cites Mr. Justice's Renquest and United States against Michaelson.

Now, none of this was done by your Honor, and your Honor accepted blindly the good faith behavior of the district attorney and didn't bother to check, and I suggest that the type of evidence your Honor permitted to go in is of a grevious nature, it cannot be eradicated from the minds of the jury by a court's instructions.

Now, he knew, Mr. Broomer did, or should have known, that these allegations were directed against two people. This police officer, and that Sargeant. They were sustained, and if they were sustained, they would have been directed against either one or either one of them

would have been convicted. None of them were. That was permitted to be done. Your Honor has denied me access to information that he uses. That I can't be of assistance to the court. I now move for a mistrial.

THE COURT: Motion is denied.]

SENTENCING MINUTES

[THE COURT: It is frequently said that the most difficult aspect of a Judge's duty is to impose an appropriate sentence upon a convicted defendant. Looking at Gilbert and Sullivan, they advised that we should let the punishment fit the crime. Shakespeare's Portia counsels that justice be tempered with mercy. Various factors are cited by criminologists, by jurists, by legislators, sociologists and others as an appropriate component of the equasion that produces an amorphous appropriate sentence. Yet, in the final analysis the determination of the appropriate sentence is very often an uncertain and tentative approximation by the Judge of a course that will best serve the needs of society and justice. This defendant, Americo Mongiello, stands convicted of perjury, official misconduct and harassment. Crimes committed under circumstances that reveal a betrayal of the trust placed in him by the community, reveal a disregard of the responsibilities that trust imposed upon him and a tarnish of the uniform he wore.

It is perhaps true that the complete facts as to how the gun came to be discharged in the hallway at 2980 Madison Avenue on the night of February 4th, have not yet, and perhaps never will be, fully revealed. The jury here however, has concluded that this defendant lied when he swore under oath that he saw Freddie Jones with that in his hand, that he lied further when he swore he saw Freddie Jones discharge that gun. The jury has concluded further, that this defendant unnecessarily struck Lester Bryant with a service revolver while affecting Bryant's arrest.

Now certainly none can deny the hazards of the horrendous proportions that are placed on members of the police force as they patrol our streets attempting to protect us from predators abroad among us. Nor can any deny the

ever present need for a vigilant police force, dedicated to the apprehension of criminals and the detection of lawlessness. When these * * *
in lawless conduct, the very fabric of our society is weakened and all of us are diminished thereby.

It should be understood that I do not intend, by these remarks to refer to any other than this defendant, other police officers who are not here involved, however, as would other citizens of our community in positions of trust in confidence would do well to mark these words, our police are our guardians, and they should guard us well in all forms of lawlessness, including their own.

When they fail then those who guard the guardians, our Courts and the law, must respond appropriately. Americo Mongiello betrayed the trust. He has unjustly borne false witness against his neighbor by perjuring himself before the Grand Jury. For that transgression he must be punished and his punishment ought to stand as a beacon to others that the People of our community will not abide such transgressions. This defendant has displayed a total lack of remorse and even now protests his innocence through his counsel. Perhaps at another time and another place those protestations will prevail. This Court is satisfied however, that the evidence before this jury established the defendant's guilt beyond a reasonable doubt. In determining the sentence to be imposed the Court here is satisfied that incarceration of this defendant is demanded. Moreover, a minimum period of incarceration is likewise demanded both in order to adequately punish this defendant for the violation and the trust the community placed him by appointing him as one of its guardians, and to demonstrate to others who are guardians that higher standards of conduct and greater fealty to their oath is demanded.

It is therefore the sentence of this Court that in respect to his conviction of the crime of perjury in the first

degree under the first count of the indictment, this defendant be incarcerated in an appropriate institution selected by the Commissioner of Correctional Services of the State of New York for a period of not less than eighteen months, not greater than four and one half years. It is likewise the sentence of this Court that the defendant similarly be incarcerated in connection with his conviction for the crime of perjury in the first degree under the second count of this indictment for a period of not less than eighteen months and not greater than four and one half years. In connection with the defendant's conviction for the crime of official misconduct under the third count of the indictment, it is the sentence of this Court that he be incarcerated similarly for a period of one year. And likewise, in respect to his conviction for the crime of official misconduct under the fifth count of the indictment that he be incarcerated for a period of one year. In regard to the defendant's conviction for violation of harassment under the fourth count of the indictment it is the sentence of this Court that he be incarcerated for a period of fifteen days.

It is further the sentence of this Court that these sentences imposed here shall run concurrent, one with the other. In imposing this sentence this Court has considered the fact that this is this defendant's first conviction. The Court has considered the fact that he has been dismissed from the Police Department, and further the fact that his incarceration will deprive his young children of his companionship for some period of time. The Court observes however, as pointed out in the probation report and earlier eluded to by the Court that given a position of trust and the power vested in him as a police officer by the community, his behavior assumes an especially heinous character and represents a most serious violation of his sworn duties to uphold the law and not to abuse his powers.

It is ordered that a copy of the sentencing minutes be made part of this defendant's record and a copy be transmitted by the clerk to the Commissioner of Correctional Institutions, along with his commitment.

No. 80-509

Supreme Court of the United States

October Term, 1980

AMERICO MONGIELLO,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for Writ of Certiorari to the New York Supreme Court, Appellate Division, First Department

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

On July 13, 1979, petitioner Americo Mongiello was convicted in the Supreme Court, New York County (ALEXANDER, J.), after a jury trial, of two counts of PERJURY IN THE FIRST DEGREE (New York Penal Law §210.15), two counts of OFFICIAL MISCONDUCT (New York Penal Law §195.00), and one count of HARASSMENT (New York Penal Law §240.25). On September 19, 1979, petitioner was sentenced

to concurrent indeterminate prison terms on his various offenses, the greatest of which was one and one-half to four and one-half years on the perjury convictions. By an order dated June 24, 1989, the Appellate Division, First Department, of the New York Supreme Court unanimously affirmed the judgment against petitioner without opinion. 76 A.D.2d 807. On July 30, 1980, leave to appeal to the New York Court of Appeals was denied. 50 N.Y.2d 1063.

Petitioner now seeks a writ of certiorari to review the order of the Appellate Division entered on June 24, 1980.

Statement of the Case*

The evidence at trial established that petitioner, a New York City police officer, gave false testimony before the June 1978 Special Narcotics Grand Jury of the City of New York about an incident which took place on February 4, 1978. The evidence further established that during the February 4th incident, petitioner, using the butt of his gun, unlawfully struck a man on the head.

The People proved that during the early evening of February 4, 1978, several police officers, including petitioner, raided the ground floor hallway of a building in Manhattan, the location of a narcotics "shooting gallery." One of the civilians in the hallway, Lester Bryant, tossed a gun away when he heard the police enter (T. 336-337).** Petitioner, who had entered with his service revolver drawn, saw the

* Petitioner's "Statement of Facts" (Pet. A. 3) is nothing more than a restatement of the defense evidence at trial. This evidence was rejected by the jury.

** Page references preceded by "T." are to the trial minutes.

gun on the floor. As petitioner retrieved the gun, either that gun or his own service revolver fired (T. 111-112, 337). Petitioner was hit by a ricocheting bullet fragment. The fragment caused a minor neck injury (T. 493, 610-615, 623). The police then gathered all the civilians in the hallway and lined them up against the wall. The civilians were repeatedly asked who had owned the gun found by petitioner. The civilians were beaten, threatened, and thrown down a flight of stairs in an effort to determine the gun's owner. Lester Bryant, like several others, was hit over the head by petitioner with the butt of petitioner's service revolver. The police ultimately charged a man named Freddie Jones with shooting petitioner (T. 114-124, 131-137, 159, 223-231, 338-345, 349, 353, 432, 488-497, 561-578).

On May 31, 1978, a grand jury was empanelled to investigate the circumstances of petitioner's shooting. Approximately forty-six witnesses testified (T. 207-309). Petitioner, who waived immunity, testified before the grand jury that Jones had had a gun in his hand. He further testified that another police officer, Sergeant John Hooper, had tackled Jones, at which point Jones' gun "went off" (T. 272-288).

The defense presented testimony at trial in an effort to demonstrate that petitioner had not lied before the grand jury and that his version of Jones' firing the gun was correct (T. 800-808, 1245-1246, 1292, 1295).* The defense witnesses, including Sergeant Hooper, also testified that the police had simply used "necessary force" to control a violent and unruly mob (T. 811, 897, 1071-1074, 1261, 1312).

* The claim that Jones had the gun was contrary not only to Bryant's testimony, but also to three other witnesses, including Jones, who testified that Jones was nowhere near the location from which the shot was fired (T. 485, 557-558, 108-109).

Sergeant Hooper also testified as a character witness for petitioner, stating that petitioner had a good reputation for "non-aggressiveness" (T. 822-823). On cross-examination, the prosecutor inquired about Hooper's knowledge of petitioner's reputation. He asked if Hooper had heard that petitioner had wrongfully punched a man in April of 1975 (Pet. A. 15a). Hooper testified that he had no memory of such an incident (Pet. A. 16a-17a). The basis for the prosecutor's question was a civilian complaint filed against petitioner with the Police Department. When defense counsel objected to the question, the court held a sidebar conference and reviewed the complaint report offered by the prosecutor as the basis for his inquiries (T. 872-873). Defense counsel's objection to the question on the ground that the police administrative board which held a hearing on the complaint did not conclude that misconduct had occurred was overruled (Pet. A. 15a, 19a-24a).

At sentencing, the judge stated that the evidence demonstrated that petitioner had unjustly perjured himself. The judge further stated that petitioner's acts constituted a violation of the special trust placed in him by society. The judge indicated that the sentence imposed was necessary "in order to adequately punish this defendant for the violation [of] the trust the community placed [in] him by appointing him as one of its guardians, and to demonstrate to others who are guardians that higher standards of conduct and greater fealty to their oath is demanded" (Pet. A. 26a).

ARGUMENT

No substantial question is presented by petitioner's claim that his right to due process was violated by an evidentiary ruling permitting the prosecutor to impeach the basis of knowledge of a character witness or by petitioner's claim that he was denied equal protection on the ground that the sentencing court considered his position as a police officer in sentencing him. Moreover, as to this latter claim, certiorari should not be granted as the issue has been raised for the first time in his petition.

A. No substantial issue of federal due process arises out of New York's evidentiary rule permitting the prosecutor to impeach the knowledge of a defense character witness as to a defendant's reputation.

Petitioner claims that he was deprived of due process because the New York courts permitted the prosecutor to impeach the knowledge of a character witness for petitioner by inquiring if the witness had heard of an incident underlying a civilian complaint against petitioner which did not result in disciplinary action.

Petitioner raises no substantial federal question for this Court to review. Indeed, the claim raised by petitioner involves no federal question at all.

This Court, of course, has long refrained from interfering in the power of the states to develop evidentiary rules unless such rules violated the United States Constitution. As this Court stated in *Spencer* v. *Texas*:

> [i]t would be a wholly unjustifiable encroachment by this Court upon the constitutional power of States to

> promulgate their own rules of evidence to try their own state-created crimes in their own state courts, so long as their rules are not prohibited by any provision of the United States Constitution. 385 U.S. 554, 568-569 (1967).

Furthermore, the Court in *Spencer* recognized that evidentiary rules—even where the rules are prejudicial and the prejudice is inadequately vitiated by limiting instructions—rarely implicate the due process clause. 385 U.S. at 562, 564.

Other than his conclusory assertion, petitioner relies on nothing which even remotely supports his claim that any constitutional prohibition is implicated by New York's evidentiary rule. His principal case, *Michelson* v. *United States,* 335 U.S. 469 (1948), was expressly held in *Spencer* to involve only the supervisory power of this Court over the federal courts and did not lay down any constitutional rule. 385 U.S. at 563. The other cases relied upon by petitioner also involve nothing more than the rules of evidence to be applied in federal courts. Not one of the cases suggests that the rules applied in federal prosecutions are coextensive with the due process clause.* Indeed, this Court in *Michelson* noted that the Supreme Court was not the best forum to adjudicate evidentiary issues or develop rules of evidence. 335 U.S. at 485-486.

Moreover, even in its exercise of supervisory powers, through which the Court can exercise broader control over the federal courts than by merely enforcing provisions of

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* *Jackson* v. *Denno,* 378 U.S. 368 (1964), cited by petitioner, involves the determination of a confession's voluntariness, and, of course, has nothing whatsoever to do with the impeachment of character witnesses.

the Constitution, this Court, in *Michelson,* established principles which demonstrate that the question posed by the prosecutor here was plainly appropriate. Once petitioner put his reputation in issue, he threw "open the entire subject which the law has kept closed for his benefit" and the prosecutor was permitted "to show that damaging rumors, whether or not well-grounded, were afloat—for it is not the man that [petitioner] is, but the name that he has which is put in issue." 335 U.S. at 479. The civilian complaint was something that Sergeant Hooper, himself a police officer and allegedly a close colleague of petitioner's, would likely have heard about if he were truly knowledgeable about petitioner's reputation. The complaint provided a sufficient good faith basis for the question even though the administrative hearing on it did not result in disciplinary action against petitioner. This is so since an arrest, a false arrest, or even an acquittal "may damage one's good name"; thus, if the character witness, as here, had not heard about the report the jury could well "doubt whether he is capable of giving any reliable conclusion as to [petitioner's] reputation." 335 U.S. at 483.

Finally, even if the question posed to the witness was somehow a violation of petitioner's constitutional rights, petitioner has made no effort to show how this single question on a matter collateral to guilt prejudiced him. Certainly, this single question, beyond all reasonable doubt, would not have influenced the verdict of the jury.

B. The Court is without jurisdiction to review petitioner's claim that in sentencing him the judge violated his right to equal protection because he raises it for the first time in his petition. In addition, no substantial question is raised by the claim.

Without citing a single authority, petitioner blithely asserts that he was denied equal protection when the judge stated at sentencing that "petitioner's punishment was to serve as an example to others." He contends that the judge "paid no heed to the fundamental constitutional requirements of individualized as contrasted to group punishment" (Pet. A. 9).

First, this claim was not raised in the state courts. On his appeal to the Appellate Division, petitioner objected to his sentence, but his argument, in its entirety, was:

> The predicate for this harsh sentence was based in part on the fact that the [petitioner], a public official, abused his trust. The sword should cut both ways. *See* [*People* v. *Tyler,* 46 N.Y.2d 251 (1978)].

Defense counsel, by his somewhat ambiguous claim before the state court, appears to have challenged the alleged harshness of petitioner's sentence for perjury. His claim—supported by a case having absolutely nothing to do either with sentencing or equal protection—certainly was not a challenge on the ground that there was a denial of equal protection. Since petitioner did not raise the claim presented now to the state courts, this Court lacks the jurisdiction to address it. *Tacon* v. *Arizona,* 410 U.S. 351 (1973); *Cardinale* v. *Louisiana,* 394 U.S. 437 (1969).

In addition, the claim raises no substantial question. The sentencing court found its perjury sentence, which was

less than the maximum permitted by New York law for petitioner's offense, necessary "to adequately punish [petitioner] for the violation" (Pet. A. 26a). Petitioner's offense was a serious one. Conduct such as petitioner's enforces the public's perception that some law enforcement officials act with flagrant disregard of the laws they are sworn to uphold. Underlying petitioner's conviction were acts of brutality, a cover-up of police misconduct, and an attempt to frame an innocent person for a serious offense.

Petitioner's theory that the court could not consider the deterrent effect of petitioner's sentence on other police officers is frivolous. Certainly, a sentencing court may consider the deterrence of criminal acts by others. *Williams* v. *New York,* 337 U.S. 241, 248 (1949). Surely, also, a concern about police officers who commit perjury in connection with the performance of their duties is not a concern based upon invidious discrimination. *Cf. Lehnhausen* v. *Lake Shore Auto Parts,* 410 U.S. 356 (1973). Such offenses perpetuate the public's view that law enforcement officials abuse their authority and act above the law. With equal certitude, even were one to require a "compelling state interest," it can hardly be maintained that the state does not have such an interest in the punishment of those who abuse special trusts placed in them and the prevention of such abuses by others.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Assistant District Attorneys
Of Counsel

October, 1980

No. 80-509

In the

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-against-

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT.

Reply Brief In Support of Petition For a Writ of Certiorari

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In the

United States Supreme Court

October Term, 1980

AMERICO MONGIELLO,

Petitioner,

-against-

The People of the State of New York,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT.

Reply Brief In Support of Petition For a Writ of Certiorari

PRELIMINARY STATEMENT

This reply brief is tendered in answer to the Brief heretofore submitted by the respondent which contended:

(1) That even if there were an evidentiary violation it would not under *Spencer v. Texas,* 385 U.S. 554 (1967) rise to constitutional dimension within the purview of the due process clause of the Fourteenth Amendment to the Constitution, and;

(2) That *even if* there was a violation of the equal protection clause of the said Amendment, it could not be considered in this Court since it had not been presented to the New York State Courts.

It is submitted that neither contention is dispositive of the issues presented in this Petition for a Writ of Certiorari.

I.

The Due Process Aspect

Spencer v. Texas, 385 U.S. 554 (1967) relied to a marked degree upon *Delli Paoli v. United States,* 352 U.S. 232 (1957), which was overruled in *Bruton v. United States,* 391 U.S. 123 (1968), and which should, in light thereof, be reevaluated insofar as it applies to *Michelson v. United States,* 335 U.S. 469 (1948).

The petitioner was a New York City police officer. He was convicted of perjury, official misconduct and harassment, predicated upon the use of more than "necessary force" in effecting multiple arrests. The testamentary evidence was diametric as to what actually occurred after the petitioner was shot. The case, thus, centered upon whether, indeed, there had been lawlessness by those sworn to uphold the law. Within that aegis, for a prosecutor to inquire of a defense character witness, i.e., Sergeant John Hooper, who was the petitioner's superior officer, whether he had heard that the petitioner while on duty had wrongfully and without justification "punched a man in the face" and then had handcuffed him knowing full well that the petitioner had been exonerated, and asking it bereft of good faith, is egregious. It is matched only by the intrepedity of the respondent in now contending that it would not have influenced the verdict of the jury. (Respondent's Brief in Opposition, p. 7.)

The petitioner was deprived of due process by having such a query put to a witness by a prosecutor acting not only in the absence of good faith but also well knowing

that it was not true. As such, the petitioner was as much deprived of due process as he would have been by the knowing use of false testimony.

II.

The Equal Protection Claim

The petitioner did present this claim on appeal to the Appellate Division of the Supreme Court of the State of New York.

He set forth as the 5th question presented to said Court, "The sentence imposed was excessive." (Petitioner's Brief to the Appellate Division, p. 2.) Additionally, he made reference to *People v. Tyler,* 46 N.Y.2d 251 (1978).

There the Court of Appeals of the State of New York unanimously affirmed the reversal by the Appellate Division of its unanimous reversal and dismissal of an indictment of a Justice of the Supreme Court of the State of New York, who had been convicted after a jury trial of three counts of perjury in the first degree and been sentenced to probation.

This may have been an emotional and ill advised attack upon a judge, but it certainly made clear that the petitioner felt that as a police officer he was not receiving the same treatment as that afforded to a judge. He certainly contended that he was truly being deprived of equal protection of the law.

This was a strident outcry of one who felt that he was being wronged. This was not restrained silence. The point was made and considered by the State Courts.

Conclusion

The respondent contends that "underlying petitioner's conviction were acts of brutality, cover-up of police misconduct, and an attempt to frame an innocent person for a serious offense." (Brief in Opposition to Petition for Writ of Certiorari, p. 9.)

If this were so, it would be exceeded in opprobrium only by the petitioner being adjudged guilty upon evidence violative of due process and sentenced as one who was being punished not for his own putative misdeeds, but for those of other police officers not then before the Court. Such is not justice.

A Writ of Certiorari should thus be granted so as to review and decide the claimed deprivations of the petitioner's rights under the Fourteenth Amendment to the United States Constitution.

Respectfully submitted,

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